No. 76-947

In the Supreme Court of the United States

OCTOBER TERM, 1976

RODEWAY INNS OF AMERICA, INC., ET AL., PETITIONERS

v.

MAURICE B. FRANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Pursuant to the provisions of the National Housing Act, 48 Stat. 1246, 12 U.S.C. 1701 *et seq.*, Mansion House Center, a housing project in St. Louis, Missouri, was endorsed for mortgage insurance by the Department of Housing and Urban Development (HUD) in September 1967. The project, a group of three separately mortgaged apartment towers, had a financially troubled history from its inception. Prior to 1971, the mortgagees twice had modified the terms of the mortgages to provide for the deferment of principal payments. In late 1971 all three mortgages went into default; the mortgages were assigned to HUD pursuant to 12 U.S.C. 1713g, and in March 1972, HUD paid insurance claims totalling approximately $35.3 million. HUD determined not to foreclose on the mortgage and, in August 1972, entered into a third modification

agreement with the mortgagors. Subsequently, after substantial discussion, HUD permitted the mortgagors of the South Tower to convert that building from residential to hotel use (Pet. App. B, pp. A-6 to A-10).

Petitioners, competing hotel owners, then instituted this action against the owners of the South Tower and the Secretary of HUD, contending (1) that the Secretary's decision to allow conversion was reached improperly, (2) that conversion was barred by 12 U.S.C. 1715k(d)(3)(B)(iv) and 1731b, (3) that the owners fraudulently induced the Secretary to allow conversion, (4) that the conversion violated state law and city ordinances, and (5) that conversion denied them due process and equal protection (Pet. App. C, pp. A-25 to A-27). The district court rejected contentions (2) and (5) on the merits and held that petitioners lacked standing to assert contentions (1), (3), and (4) (Pet. App. C). The court of appeals affirmed (Pet. App. B).[1]

The decisions below are correct and do not conflict with the decisions of this Court or of other courts of appeals.

1. The conversion of South Tower to hotel use was not barred by the National Housing Act. Petitioners principally rely upon 12 U.S.C. 1731b, in which Congress declared its intention to "exclude[] the use of * * * housing [built with the aid of federally insured mortgages] for transient or hotel purposes while such insurance on the mortgage remains outstanding." 12 U.S.C. 1731b(a).[2] But the court of appeals correctly pointed out (Pet. App. B, p. A-14):

> By its clear terms [this provision] applies only 'while the mortgage insurance remains outstanding.' In the present case the mortgage insurance has been terminated, the insurance benefits have been paid to the original mortgagee, and that mortgagee has assigned the mortgage to HUD. Thus, no right to relief exists under [12 U.S.C.] 1731b.

[1]Petitioners did not raise contention (5) on appeal (Pet. App. B, p. A-9).

[2]The statute permits persons owning or operating a hotel within a radius of fifty miles of a project used for transient or hotel purposes to sue to enjoin a violation of that provision. 12 U.S.C. 1731b(i). Thus petitioners had standing to assert an alleged violation of that statute.

Moreover, as the court further noted (Pet. App. B, p. A-13), "[t]he language limiting the application of the section to the period 'while such insurance on the mortgage remains outstanding' does not appear to be a mere slip of the pen." Congress intended the Secretary, "[n]otwithstanding any other provision of law" (12 U.S.C. 1713(*l*)), to have maximum leeway in dealing with property covered by assigned mortgages, in order to minimize the financial loss to the taxpayers.

2. Petitioners lacked standing to raise their claims that the Secretary's decision to allow conversion was reached improperly or was fraudulently induced.[3] The court of appeals correctly began with the test enunciated by this Court in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153, and *Barlow* v. *Collins*, 397 U.S. 159, 164, which requires that a would-be plaintiff allege injury in fact and that the plaintiff's interests arguably come within the "zone of interests to be protected by" the relevant statute. As the court of appeals found, the "overall intent of Congress" in passing the National Housing Act "was to aid home construction, not to protect

[3]The district court held that petitioners lacked standing to challenge the conversion as a violation of state and local urban renewal laws (Pet. App. C, pp. A-36 to A-37). The court of appeals affirmed, holding that it found no error in the district court's interpretation of state law (Pet. App. B, p. A-20). That narrow issue does not warrant further review by this Court.

hotel owners from the competitive impact of projects built with government-insured loans" (Pet. App. B, p. A-18).

In reaching this conclusion, the court held that it was necessary to "examine the National Housing Act as a whole, as well as the specific statutory provisions. *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970)" (Pet. App. B, p. A-17). The court then correctly adopted the district court's reading of the statutory purpose (Pet. App. B, pp. A-17 to A-18, quoting from Pet. App. C, p. A-30):

> The *overall* purposes of the National Housing Act do not include the regulation or protection of competition among hotel operators. The intentions of Congress regarding the Act have been variously described as the "aid[ing of] veterans and their families", *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 87 (1958), and the providing of decent homes for persons with low income. *Davis* v. *Romney*, *supra* at 1365; *Thompson* v. *Washington*, 497 F. 2d 626 (D.C. Cir. 1973). Congress declared the purpose of §220 of the Act (urban development) to be "to aid in the elimination of slums and blighted conditions and the prevention of the deterioration of residential property . . ." 12 U.S.C. §1715k(a).

Petitioners rely upon 12 U.S.C. 1715k(d)(3)(B)(iv) for the proposition that Congress intended to protect competing hotel operators.[4] That statute requires that, in considering applications for mortgage insurance, the Secretary must "give due consideration to the possible effect of the project on other business enterprises in the community." Thus that

[4]Petitioners also rely upon 12 U.S.C. 1731b(i). But that statute only confers standing for the narrow purpose of challenging alleged violations of Section 1731b (see note 2, *supra*). Petitioners were granted the full degree of standing conferred by that provision.

provision, like 12 U.S.C. 1731b (see pp. 2-3, *supra*), relates solely to the operation of the project while HUD mortgage insurance is outstanding. Once it is necessary for HUD to pay insurance claims and accept assignment of the mortgage, the Secretary's discretion to deal with the property is unfettered by any restriction on commercial use. See 12 U.S.C. 1713(*l*). Accordingly, the court of appeals correctly determined that petitioners were outside "the zones of protection defined by Congress" (Pet. App. B, p. A-18).[5]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General.

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[5]*Davis* v. *Romney*, 490 F. 2d 1360 (C.A. 3), is not to the contrary. There, the court of appeals held that purchasers of federally-insured homes had standing to litigate the question whether standards for federal mortgage insurance were properly adhered to, on the ground the interest of eligible families in obtaining decent housing is "[b]eyond dispute * * * among the interests protected by the National Housing Act." 490 F. 2d at 1365. The decision below does not conflict with that decision.

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